

Harris Vs. Wall

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Decided On : 1849

Appeal No. : 48 U.S. 693

Appellant : Harris

Respondent : Wall

Judgement :

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Harris v. Wall

48 U.S. (7 How.) 693

ERROR FROM THE CIRCUIT COURT OF THE UNITED

STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

SYLLABUS

The conditions under which a party is permitted and a magistrate authorized to take a deposition *de bene esse* by the thirtieth section of the Judiciary Act are:

1st. That the witness lives at a greater distance from the place of trial than one hundred miles.

2d. Or is bound on a voyage to sea.

3d. Or is about to go out of the United States.

4th. Or out of such district to a greater distance from the place of trial than one hundred miles before the time of trial.

5th. Or is ancient or very infirm.

And to entitle himself to read the deposition upon the trial, the party must show:

1st. That the witness is dead.

2d. Or gone out of the United States.

3d. Or to a greater distance than one hundred miles from the place where the court is sitting.

4th. Or that, by reason of age, sickness, or bodily infirmity, he is unable to travel and appear at court.

The authority or jurisdiction conferred on the magistrate is special, and confined within certain limits or conditions, and the facts calling for the exercise of it should appear upon the face of the instrument, and not be left to parol proof.

Therefore, where the magistrate, in his notice to the opposite party, only said that the witness was about to "depart the state," and in his certificate omitted to state the reason for taking the deposition, it was not competent for the party, at the trial, to supply the defect by proving that the witness was about to go out of the United States.

The service of the notice upon the opposite party should be certified by the magistrate as well as the marshal.

When counsel have signed an agreement that a deposition may be read in evidence to the jury, it is too late, after its reading, to ask the court to exclude from the consideration of the jury a part of the deposition.

In February, 1839, the following sealed note was executed:

"\$10,391.06 *Clinton, Miss., February, 1839* "

"On or before the first day of January, eighteen hundred and forty, we or either of us promise and bind ourselves, our heirs &c.;, to pay to Benjamin D. Harris his heirs or assigns, the sum of ten thousand three hundred and ninety-one dollars and six cents, with eight percent interest thereon from the date hereof."

"Given under our hands and seals, the day and date above written."

"T. W. WINTER [SEAL]"

"JAS. M. WALL [SEAL]"

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Suit was brought upon this note at May term, 1840. Judgment went against Winter by default, and it is not necessary to notice him further.

Wall put in three pleas. The first two were substantially the same, and were, that the introduction of slaves into Mississippi, as merchandise, after the first day of May, 1833, was prohibited by the constitution of that state, and the contract for their purchase and sale, therefore, void. These pleas averred that the note was given for the purchase of slaves so introduced. To these pleas the plaintiff took issue.

The third plea was that the slaves were above the age of fifteen years, and were introduced into the State of Mississippi from one of the United States as merchandise, and sold to Winter by the plaintiff, without having complied with the fourth and fifth sections of an act entitled "An act to reduce into one the several

acts concerning slaves, free negroes, and mulattoes," passed June 15, 1822. To this plea the plaintiff demurred.

In November, 1844, the cause came on for trial, issue having been joined upon the first two pleas, and a joinder in demurrer having been filed as to the third. The jury found a verdict for the defendant upon the issue upon the first two pleas, and the record did not show any judgment of the court upon the demurrer.

In the course of the trial, the plaintiff, Harris took four exceptions to opinions of the court.

1st. As to the admissibility in evidence of the deposition of William S. Rayner.

2d. As to the admissibility in evidence of parts of the deposition of Benjamin G. Sims.

The 3d and 4th were, that Wall had filed a bill in chancery against Harris which Harris had answered, and that Wall could not, in a trial at law, introduce evidence to contradict Harris' answer.

1st exception -- as to Rayner's deposition.

The following is the notice and certificate attached to the deposition.

" *Jackson, May 1, 1843* "

"Mr. B. D. HARRIS, or Messrs. RIVES & SHELTON, his Attorneys at Law:"

"Take notice, that on Wednesday next, the third day of May, A.D. 1843, at the clerk's office of the Circuit Court of the United States for the Southern District of Mississippi, between the hours of eight o'clock, A. M., and three o'clock, P.M., at the town of Jackson, I shall take the deposition of William S. Rayner (about to depart the state) to be read on the part of the

defendant *de bene esse* in a certain action at law, depending in said court, wherein said Harris is plaintiff, and Winter and Wall defendants, where you can attend. Yours &c.;"

"GEO. W. MILLER, *U.S. Commissioner* "

Marshal's return:

"Executed by handing Wm. M. Rives a copy between the hours of eleven, A.M., and twelve, M., May 1, 1843."

"ANDERSON MILLER, *Marshal* "

"By Z. P. WARDELL, *D.M.* "

"The deposition of William S. Rayner, taken before the undersigned commissioner of affidavits in and for the Southern District of Mississippi, at the clerk's office of the Circuit Court of the United States for the Southern District of Mississippi, in the Town of Jackson, between the hours of eight o'clock, A.M., and three, P.M., on the 3d day of May, A.D. 1843, according to a notice by me issued and hereunto annexed; said deposition to be read as evidence on the part of the defendant *de bene esse* in the trial of a certain action at law, depending and mentioned in the Circuit Court of the United States for the Southern District of Mississippi, wherein Benjamin D. Harris is plaintiff, and Winter and Wall defendants."

"[Then follows the deposition, to which is attached the following certificate:]"

" *United States of America, Southern District of Mississippi, sct.* "

"I, George W. Miller, Commissioner of Affidavits &c.; in and for the Southern District of Mississippi, do hereby certify that the foregoing deposition of William S. Rayner was taken, subscribed, and sworn to before me, and by me reduced to writing in the presence of said witness, at the time and place mentioned in the caption thereof, at the time of which I was attended by James M. Wall, one of the defendants, and William M. Rives, Esq., attorney for plaintiff, who declined putting any interrogatories to said witness. I further certify that I am not a counsel for

either party, or interested in the event of said cause."

"Given under my hand and seal at Jackson, this 3d day of May, A.D. 1843."

"GEO. W. MILLER, *U.S. Commissioner* "

The court allowed the deposition to be read in evidence, to which the plaintiff excepted.

2d exception -- respecting the deposition of Sims.

This deposition had upon it the following endorsement, *viz.:*

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"When sworn to, it is agreed this deposition of B. G. Sims may be used in the cause stated in the caption as evidence."

"RIVES & SHELTON & THOMPSON, *for Plaintiff* "

"MAYES & CLIFTON, *for Defendant Wall* "

After the defendant had read to the jury the deposition of Benjamin G. Sims, which was done subject to exceptions, the plaintiff moved the court to exclude from the jury that part of said deposition which proved or tended to prove said plaintiff to be a negro trader, but the court overruled said motion, on the ground that the counsel of the plaintiff had agreed in writing on said deposition, that the same might be read in evidence.

This opinion of the court constituted the second exception.

The third and fourth exceptions were abandoned by the counsel for the plaintiff in error, and need not be further noticed.

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MR. JUSTICE GRIER delivered the opinion of the Court.

On the trial of the issues of fact in this case before the circuit court, the defendant offered to read the deposition of William S. Rayner, which had been taken *de bene esse* under the thirtieth section of the Judiciary Act. It was objected to by the plaintiff's counsel, as not coming within the conditions prescribed by that act. The court admitted the deposition, and sealed a bill of exceptions, which is the foundation of the first assignment of error.

A notice was served on the plaintiff's counsel, signed by the commissioner or magistrate, and stating the time and place at which it was intended to be taken, and that "I shall take the deposition of William S. Rayner (*about to depart the state*) to be read on the part of the defendant, *de bene esse*, " &c.;

When the deposition was offered, the defendant proved to the court, that

"when said deposition was taken, said Rayner was on his way to the Republic of Texas, to reside there, and that he was a citizen of, and resided in, said republic."

It has been decided by this Court, in the case of [*Bell v. Morrison*](#), 1 Pet. 351, that

"the authority to take depositions in this manner, being in derogation of the rules of common law, has always been construed strictly, and therefore it is necessary to establish that all the requisitions of the law have been complied with before such testimony is admissible."

The conditions under which a party is permitted, and a magistrate authorized, to take depositions *de bene esse*, under this act, are -- 1st, that the witness lives at a greater distance from the place of trial than one hundred miles; 2d, or is bound on a voyage to sea; 3d, or is about to go out of the United States; 4th, or out of such district to a greater distance from the place of trial than one hundred miles, before the time of trial; 5th, or is ancient or very infirm.

The magistrate is required also to deliver to the court, together with the depositions so taken, a *certificate of the reasons of their being taken*, and of the notice, if any, given to the opposite party. In order to entitle the party to read such

depositions when taken and certified in due form of law, he must show that, at the time of the trial -- 1st, either the witness is dead; 2d, or gone out of the United States; 3d, or to a greater distance than one hundred miles from the place where the court is sitting; 4th, or that, by reason of age, sickness, or bodily infirmity, he is unable to travel and appear at court.

Now assuming that the defendant has brought himself within the conditions which would enable him to read a deposition regularly taken and certified according to the requisitions of this act, the question is whether this deposition was so taken and certified.

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The authority or jurisdiction conferred on the magistrate by this act is special, and confined within certain limits or conditions, and the facts calling for the exercise of it should appear upon the face of the instrument, and not be left to parol proof. The act of Congress requires them to be certified by the magistrate. It would be reasonable also, where notice is required to be given to the opposite party, that such notice should show on its face that the contingency has happened which confers jurisdiction on the magistrate, and gives a right to the party to have the deposition taken, so that the party on whom the notice is served may be able to judge whether it is necessary or proper that he should attend. The notice in this case states only that the witness is "about to depart the state," not that he is bound on a voyage to sea or about to go out of the United States or a hundred miles from the place of trial.

This notice is appended or annexed to the deposition, with a return of service by the marshal, but the service is not certified by the magistrate, nor does he certify, as required by the act, "the reasons" for taking the deposition. The presence of the plaintiff's attorney, who declined to take any part in the proceedings, cannot affect the case or amount to a waiver of any objection to the want of authority apparent on the face of this certificate.

We are of opinion, therefore, that the court erred in admitting this deposition to be read to the jury.

The third and fourth exceptions have been abandoned on the argument, and the second does not appear to be well taken. When parties, with a full knowledge of the contents of a deposition, agree that it shall be read to the jury on the trial of the cause, they have no right to complain of the court for not excluding from the consideration of the jury the very matter which they themselves have agreed should be read to them.

The record in this case does not show that any judgment was given by the court below on the demurrer. If a defendant plead several pleas in bar, either of which is a defense to the whole action, and one be found in his favor, he is entitled to judgment. For this reason the parties may have considered it unnecessary to pray the judgment of the court on the plea demurred to, as the issues on the other pleas had been found in favor of the defendant, and judgment rendered thereon for him. And the plaintiff here, who was also plaintiff below, cannot assign error on an issue in which there was no judgment of the court below. The validity of the defense set up in that plea is consequently not before this Court, and cannot be noticed. But as the trial of these issues below took place before the decision in this Court of the cases of [Harris v. Runnels](#), 5 How.

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135, and [Sims v. Hundley](#), 6 How. 1, and as these cases show that the issues of fact are immaterial, though found for the defendant, the defense will probably turn wholly on the decision of the point raised by the demurrer.

The judgment of the circuit court is

Reversed.

ORDER

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said circuit court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said circuit court with directions to award a *venire facias de novo*.

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